

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34719

STATE OF IDAHO,)	2009 Unpublished Opinion No. 426
)	
Plaintiff-Respondent,)	Filed: April 15, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
EDWARD NINO ALFARO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. James C. Morfitt, District Judge.

Judgment of conviction for aggravated battery, affirmed.

Robyn A. Fyffe of Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Edward Nino Alfaro appeals from his judgment of conviction for aggravated battery, contending that the district court committed fundamental error by failing to give the jury an instruction on “the inherent dangers of eyewitness identification.”

Alfaro was found guilty by a jury of committing a drive-by shooting. At trial, several witnesses identified Alfaro as the shooter. He argues on appeal that suggestive photo lineup procedures utilized by the police and other factors rendered these witnesses’ identification of Alfaro unreliable, and that the trial court therefore should have given a jury instruction on the inherent dangers of eyewitness identification even though no such instruction was requested.

According to Alfaro, this failing constituted fundamental error for which he is entitled to a new trial.¹

The Idaho Supreme Court recently rejected just such an argument in *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008). The Court there stated:

In charging the jury, the court must state to them all matters of law necessary for their information. I.C. § 19-2132(a). Either party may present to the court any written charge and request that it be given. *Id.* “A defendant is entitled to an instruction where ‘there is a reasonable view of the evidence presented in the case that would support’ the theory.” *State v. Eastman*, 122 Idaho 87, 90, 831 P.2d 555, 558 (1992). However, there is no duty for a trial court *sua sponte* to instruct the jury on every theory the defendant may have. “It is incumbent upon the defendant to submit a requested instruction or in some other manner apprise the trial court of the specific instructions requested.” *Id.*

Pearce failed to offer an instruction on the dangers inherent in eyewitness identification. This Court will not allow a defendant to appeal an instruction which was never offered at the trial level, unless that instruction constitutes a necessary matter of law whose omission would constitute fundamental error. *State v. Anderson*, 144 Idaho 743, 748-49, 170 P.3d 886, 891-92 (2007) (holding that even though new Idaho Criminal R. 30 expressly requires objection to preserve jury instruction issue on appeal, defendant may still appeal jury instructions, even without objection, where fundamental error occurs in instructions).

It is the defendant’s obligation to present his theories to the trial court, and the trial court is not under a duty to determine on which theories to instruct the jury. *Eastman*, 122 Idaho at 91, 831 P.2d at 559. A defendant may not claim error on appeal for a defense theory which does not constitute a necessary matter of law and for which no instruction was requested. The trial court did not err in failing *sua sponte* to instruct the jury on the inherent dangers of eyewitness identification.

Id. at 247-48, 192 P.3d at 1071-72. As the *Pearce* decision is directly on point rejecting the argument advanced here by Alfaro, we hold that Alfaro has shown no fundamental error.

Accordingly, the judgment of conviction is affirmed.

Judge PERRY and Judge GRATTON **CONCUR.**

¹ As no such instruction was requested below and on appeal Alfaro has not identified what the necessary and acceptable content of such an essential jury instruction would have been, what the district court should have told the jury on this subject, according to Alfaro, remains undefined.